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SUPREME COURT OF MINNESOTA.

SPARROW v. POND (POND, Intervener).

SYLLABUS.

Growing Crops—Liability to Execution—"Fructus Industriales" and "Fructus Naturales"—Blackberries.

At common law those products of the earth which are annual, are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, termed "emblems," and sometimes "*fructus industriales*," including grain, garden vegetables and the like, are, even while still annexed to the soil, treated as chattels, and may be attached or taken in execution.

On the other hand, the fruit of trees, perennial bushes and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," are, while still unsevered from the soil, considered as pertaining to the realty, and are not subject to attachment or execution apart from it.

The proper test by which to distinguish between "*fructus industriales*" and "*fructus naturales*" is whether the subject matter will bear successive crops for years, thus permanently enhancing the value of the land, or will produce a single crop only, which will be the sole return for the labor expended.

Blackberry bushes are perennial, and when once planted yield successive crops. Blackberries, therefore, are "*fructus naturales*," and, while growing on the bushes, are not subject to levy and sale on execution as personal property.

The facts are sufficiently stated in the opinion of the Court.

S. T. Littleton, for appellant. *Samuel Lord* and *Robert Taylor*, for respondent.

OPINION OF THE COURT.

MITCHELL, J. At common law those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, termed "emblems," and sometimes "*fructus industriales*," were, even while still annexed to the soil, treated as chattels, with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after his death. This class included grain,

garden vegetables and the like. On the other hand, the fruit of the trees, perennial bushes and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," were, while unsevered from the soil, considered as pertaining to the realty, and as such passed to the heir at the death of the owner, and were not subject to attachment during his life.¹ A possible exception to this classification is the case of hops on the vines, which have been held to be personal chattels, and subject to sale as such. The ground upon which this seems to be held is that, although the roots of hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation. The decisions upon that question, however, seem to be all based upon the old case of *Latham v. Atwood*.² It is sometimes stated that the test whether an unsevered product of the soil is an emblement, and, as such, personal property, is whether it is produced chiefly by the manurance and industry of the owner. But, while this test is correct as far as it goes, it is incomplete. Under modern improved methods, all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes or vines; but it has never been held that fruit growing upon cultivated trees was subject to levy as personal property. No doubt all emblements are produced by the manurance and labor of the owner, and are called "*fructus industriales*" for that reason; but the manner, as well as purpose of planting, is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "emblements." On the other hand, if the tree, bush or vine is one which requires to be planted but

¹ 4 Kent, Comm.; 4 Bac. Abr. 372, tit. "Emblements; Freem. Ex'ns, § 113; 1 Schouler, Pers. Prop., § 100 *et seq.*; *State v. Gemmill*, 1 Houst. (Del.), 9; *Craddock v. Riddlesbarger*, 2 Dana, 205; 9 Amer. & Eng. Enc. Law, tit. "Crops;" *Rodwell v. Phillips*, 9 Mees. & W., 501.

² Cro. Car. 515. See *Frank v. Harrington*, 36 Barb., 415.

once, and will then bear successive crops for years, the planting would be naturally calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year; and hence it would be classed among "*fructus naturales*," and the right of emblements would not attach.¹ This classification is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts (unless hops be an exception), and it is the only one which will furnish a definite and exact rule. Blackberry bushes are perennial, and when planted once yield successive crops. They grow wild, but like every other kind of fruit or berry, are improved by cultivation. The quantity and quality of the yield is largely dependent upon the amount of annual care expended upon them, but the difference in that respect between them and other fruits is only one of degree. It seems to us quite clear that at common law such berries, while growing upon the bushes were not subject to levy on execution as personal property, and we have no statute changing the rule. Evidently the main purpose of section 315, c. 66, Gen. St., was, while permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested. The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblements," and neither of them included fruits of perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the statute as to the kinds of products of the earth which may be levied on, while still attached to the soil is, perhaps, to include perennial grasses. As we are of opinion that these berries, while growing on the bushes, were not subject to levy as personal property, it becomes unnecessary to consider any other question in the case. To prevent misapprehension hereafter, it may be well, however, to say, with reference to the ques-

¹ Darlington, Pers. Prop., 26.

tion whether crops growing upon a homestead under the statutes of the State are subject to levy, or whether their seizure would be an interference with the beneficial use and control of the homestead by the debtor, that it is not determined, as counsel for appellant assume, by the case of *Erickson v. Patterson*.¹ In that case the grain grew upon land entered under the United States Homestead Law, by the provisions of which the land was not liable for debts contracted prior to the issuing of the patent, the exemption not being at all dependent upon occupancy and user as a home. Hence that case would not necessarily control the question discussed in the present case. Judgment affirmed.

LEVY ON GROWING CROPS.

I.—Although, as a general rule, growing crops are a part of the land to which they are attached (*Preston v. Ryan*, 45 Mich., 174), and, if belonging to the owner of the land, will pass by a sale of it, either voluntary or under execution, unless specially reserved: *Terhune v. Elbersen*, 2 Pa., 726; *Bear v. Bitzer*, 16 Pa., 175; *Hendrickson v. Ivins*, Saxton, 522; *Bloom v. Welsh*, 3 Dutch., 177; *Foote v. Colvin*, 3 Johns., 222; *Austin v. Sawyer*, 9 Cowen, 40; *Pattison v. Hull*, 9 Cowen, 754; *Gillett v. Balcom*, 6 Barb. (N. Y.), 370; *Crews v. Pendleton*, 1 Leigh (Va.), 297; *Pitts v. Hendrix*, 6 Ga., 452; *Jones v. Thomas*, 8 Blackf. (Ind.), 428; *Floyd v. Ricks*, 14 Ark., 286; *Rankin v. Kinsey*, 7 Ill. App., 215; *Dail v. Freeman*, 92 N. C., 351. Contra, *Houts v. Showalter*, 10 Ohio St., 124, yet, if they are such as are produced by annual labor and cultivation, they are to be regarded and treated in most respects as personal chattels. As such, they may be conveyed by parol, go to the executor or ad-

ministrator instead of to the heir, and may be levied upon and sold under execution: 4 Bac. Abr. Exrs. and Adms. (H.) 1, Bouvier's Ed. (1844), p. 83; *Brittain v. McKay*, 1 Ired. (N. C. L.), 265; *Westbrook v. Eager*, 1 Harrison (16 N. J. L.), 81; *Kimball v. Sattley*, 55 Vt., 285. Such crops are known as *fructus industriales*, to distinguish them from the perennial products of the earth, such as timber, grass and the fruits of trees, which are called *fructus naturales*, and are considered and treated as part of the realty, until severed from it in fact or in law. They are also termed in law emblements, and, properly speaking, include only the profits of sown land; but the name has been extended not only to growing crops of corn and grain, but also to roots planted and other annual artificial profits: *Smith v. Tritt*, 1 Dev. & Bat. (N. C. L.), 241; S. C., 28 Am. Dec., 565. There was formerly a widely-spread idea, however, that even *fructus industriales*, while still growing and deriving nutriment from the soil, were to be

¹ 50 N. W. Rep. (Minn.), 699.

regarded as part of the realty so far as their seizure in execution was concerned, and that they became stamped with the character of personalty for all purposes only when ripe, and, therefore, no longer intimately connected with the land, but ready to be severed from it. In other words, that their personal nature depended upon an implied severance, due to the fact of maturity. This view is strongly hinted at in some comparatively late cases: *Warwick v. Bruce*, 2 M. & S., 205; *Parker v. Staniland*, 11 East, 362; *Heard v. Fairbanks*, 5 Metc. (Mass.), 111; *Mulligan v. Newton*, 16 Gray (Mass.), 211. But this doctrine was too whimsical to survive the application of modern practical legal principles; and it is now firmly established that annual crops, raised by yearly labor and cultivation, are to be regarded as personal chattels, independent of and distinct from the land, without regard to whether they are still growing or have matured and ceased to derive any nutriment from the soil: *Carth v. Caldwell*, 72 Mo., 622.

II.—Among *fructus industriales*, and, therefore, liable to be taken in execution, have been classed grain of all kinds, wheat, rye, oats and corn, and presumably rice, barley and buckwheat: *Poole's case*, 1 Salk., 368; *Peacock v. Purvis*, 2 Brod. & Bing., 362; *Austin v. Sawyer*, 9 Cowen, 39; *Green v. Armstrong*, 1 Den., 550; *Shepard v. Philbrick*, 2 Den., 174; *Whipple v. Foot*, 2 Johns., 418; S. C., 3 Am. Dec., 442; *Stewart v. Doughty*, 9 Johns., 108; *Hartwell v. Bissell*, 17 Johns., 128; *Stambaugh v. Yeates*, 2 Rawle, 161; *Backenstoss v. Stahler*, 33 Pa., 251; *Hershey v. Metzgar*, 90 Pa., 217; *Long v. Seavers*,

103 Pa., 517; *Westbrook v. Eager*, *supra*; *Penhallow v. Dwight*, 7 Mass., 34; S. C. 5 Am. Dec., 21; *Heard v. Fairbanks*, *supra*; *Mulligan v. Newton*, *supra*; *Smith v. Tritt*, *supra*; *Carson v. Browden*, 2 Lea (Tenn.), 701; *Erickson v. Patterson*, 50 N. W. Rep., 699; *cotton: McKenzie v. Lampley*, 31 Ala., 526; *Devore v. Kemp*, 3 Hill (S. C.), 259; pease, beans, tares, hemp, flax, saffron: 1 Washb. Real Pr., 102; *Coombs v. Jordan*, 3 Bland. Ch. on p. 312, S. C. 22 Am. Dec., 286; cabbage: *Ross v. Welch*, 11 Gray, 77 Mass., 235; *Mulligan v. Newton*, *supra*; broom corn: *Bowman v. Com.*, 8 Ind., 58; tobacco: *Coombs v. Jordan*, *supra*; melons: 4 Bac. Abr., p. 83, Exrs. and Admrs. (H.), 1; 1 Washb. Real Pr., 102, and, in general, all vegetables: *Backenstoss v. Stahler*, *supra*. All annual roots, also, such as potatoes: *Warwick v. Bruce*, 2 M. and S., 205; *Parker v. Staniland*, 11 East, 362; *Evans v. Roberts*, 5 B. and C., 828; *Jones v. Flint*, 10 Ad. and El., 753; *Sainsbury v. Matthews*, 4 M. and W., 343; *Heard v. Fairbanks*, *supra*; *Mulligan v. Newton*, *supra*; carrots: *Coombs v. Jordan*, *supra*; parsnips: 4 Bac. Abs., *supra*; 9 Vin. Abr., 371, pl. 70, and turnips, *Dunne v. Ferguson*, *Hayes*, 545, although they go to the heir, and not to the executor, according to *Bacon and Viner* in the passages cited, on account of a fancied injury to be done to the inheritance by digging them, may, nevertheless, be now taken in execution as personal chattels, notwithstanding the decision in *Emerson v. Heelis*, 2 Taunt., 38, that turnips were *fructus naturales*. In short, all crops of a purely annual nature, including even sugar-cane and pep-

permint, are personal chattels, and may be taken in execution.

Among *fructus naturales* have been classed growing or standing timber (4 Bac. Abr., *supra*; Green v. Armstrong, 1 Den., 550; Slocum v. Seymour, 36 N. J. L., 138; Putney v. Day, 6 N. H., 430; Olmstead v. Niles, 7 N. H., 522; Wilson v. Douglas, 10 W. N. C., 527), growing underwood, (Scorell v. Boxall, 1 Younge & J., 396), fruit trees (Adams v. Smith, Breese, 221), and the fruit thereon, such as apples, pears, cherries, quinces, plums, apricots, peaches, and presumably oranges, lemons, bananas, etc.; Rodwell v. Phillips, 9 M. & W., 501; Craddock v. Riddlesbarger, 2 Dana (Ky.), 205; Roe v. Gemmill, 1 Houst. (Del.), 9, growing grass; (Crosby v. Wadsworth, 6 East, 602; Carrington v. Roots, 2 M. & W., 248; Norris v. Watson, 22 N. H., 364; S. C., 55 Am., Dec., 160), and nuts of all kinds, chestnuts, shellbarks, almonds, walnuts, and the like (Anon., Freem. Ch., 210). With these, according to Sparrow v. Pond (Minn.), 52 N. W. Rep., 36, (the principal case), should be included blackberries, and by analogy all berries, as raspberries and strawberries, and also gooseberries, currants and grapes, which are the annual produce of perennial roots or plants. There has been some difference of opinion in regard to plants which are not strictly of either annual or perennial nature, but which have to be replaced after a limited number of years, of which clover is perhaps the most widely known example. In Williams on Executors, 454, it is suggested that these, because of the greater care and labor necessary for their production, were to be classed with *fructus indus-*

triales; but this view was rejected, so far at least as clover was concerned, in Evans v. Iglehart, 6 Gill & J., 171, on the ground that, conceding that it was not a perennial grass, "neither is it a grass of one year only, nor the subject of cultivation after it is sown." With regard to the purely annual grasses, such as sainfoin, and the so-called Hungarian grass (which is really a grain), there can be no doubt that they are to be considered, like any other annual crop, as *fructus industriales*, and therefore liable to levy and sale under execution.

Some products, however, which would seem at first glance to fall naturally into the division of *fructus naturales*, have been held by the courts to be *fructus industriales*. The most prominent of these exceptions is that of hops. These have been almost uniformly regarded as personal property Latham v. Atwood, Cro. Car., 515; Anon. Freem. Ch., 210; Frank v. Harrington, 36 Barb. (N. Y.), 415. Contra, Waddington v. Bristow, 2 Bos. & P., 452, on the ground that, although they grow out of perennial roots, the vines die yearly, and the annual crop therefore depends in a great degree upon the annual labor and manuring of the owner, and is to be considered as really an annual product. Crude turpentine, usually known as "scrape," is treated as personal property while still adhering to the trees, because "it is not the spontaneous product of the trees, but requires annual labor and cultivation." Lewis v. McNatt, 65 N. C., 65. Trees in a nursery, also, planted for the temporary purpose of cultivation until they are old enough to sell, are to be regarded as personal property for most pur-

poses, and the tenant may sell them, because such in his trade. *Wyndham v. Way*, 4 Taunt., 316; *Penton v. Robart*, 2 East., 88; *Miller v. Baker*, 1 Metc. (42 Mass.), 27; *Whitmarsh v. Walker*, Id., 313; *Maples v. Millon*, 31 Conn., 598. The same rule would apply to plants and bulbs raised by a florist for sale, and also to those, which, although perennial, are cultivated for the sake of the annual crop of flowers.

The character of realty impressed upon *fructus naturales* may be changed to that of personalty by a severance from the soil, either actual, as by felling timber, cutting grass, or gathering fruit and nuts, or in law, as by a written conveyance of the subject-matter; and they will then become subject to all the incidents of personalty, including liability to seizure in execution. (*Smith v. Jenks*, 1 Den., 580, S. C. 1 N. Y., 90; *McClintock's App.*, 71 Pa., 366; *Caldwell v. Fifield*, 24 N. J. L., 150; *Favorite v. Deardorff*, 84 Ind., 555.) A mere mortgage of growing trees or grass, however, does not work a severance until the mortgage becomes absolute by the non-performance of its conditions. *Bank v. Crary*, 1 Barb. (N. Y.), 543. As between landlord and tenant, a severance frequently occurs when, by custom or otherwise, the tenant becomes entitled to crops which are ordinarily part of the realty. *Wintermute v. Light*, 46 Barb. (N. Y.), 278. A written agreement by the landlord that the tenant shall have the fruit of certain trees after the termination of the lease, would certainly work a severance of it when that event took place. So, too, a retention of the ownership or control of the soil by the land-

lord would work a severance of whatever *fructus naturales* the tenant was entitled to under the lease. Even in Louisiana, where growing crops are expressly declared by statute to be part of the immovable, the growing crop of a tenant is, as to him, a movable, and hence is liable to levy and sale by a judgment creditor. (*Porche v. Bodin*, 28 La. An., 761; *Pickens v. Webster*, 31 La. An., 870.) Although, as has been seen, growing crops pass by a conveyance of the land, yet if that conveyance be in fraud of creditors, and the crops be such as are liable to execution in the hands of the grantor, they will be subjected to the claims of the creditors. *Erickson v. Patterson* (Minn.), 50 N. W. Rep., 699.

III.—The old test by which *fructus industriales* were distinguished from *fructus naturales* was, whether they were produced by the annual labor and manurance of the owner, or were simply the spontaneous product of the earth. It is evident at a glance that if this rule is to be applied strictly now, it will lead to very different results from those to which it formerly led. When it was adopted, the art of growing fruit, as at present understood, was practically unknown. There was but little market for its sale, and the trees that were planted, being only for the owner's own use, were usually left to take care of themselves, without any special care or manurance. But all this is now changed, and, on account of competition and the ravages of insect pests, fruit trees are now of necessity cultivated with extreme care, at least by those who make it a successful specialty. This is especially the case with peaches; and, although, as has

been noted, one Delaware case (*Roe v. Gemmill, supra*), has held that peaches are *fructus naturales*, and cannot be taken in execution while still on the trees; a Maryland case (*Purner v. Piercy*, 40 Md., 212, S. C. 17 Am. Rep., 591), claims that "a growing crop of peaches or other fruit requiring periodical expense, industry and attention in its yield and production, may be well classed as *fructus industriales*." If this is to hold good, all cultivated fruits and berries, which have heretofore been classed as *fructus naturales*, must now be considered and treated as *fructus industriales*, and the only fruits to remain under their old classification be those which, like huckleberries and cranberries, are still allowed to grow in a wild or semi-wild state, with little or no cultivation, except their first planting.

The reasons for rejecting the old test and its attendant consequences are very strongly presented in the preceding opinion, and the criterion there laid down seems to be much more in harmony with the spirit of the common law rule, in view of the changed circumstances of the present. The test of manurance and labor was manifestly only adopted as a convenient arbitrary method of deciding the question, not as a fixed and unvarying rule. The real intention was beyond a doubt to include among *fructus industriales* those products only which were not annexed to the soil, but which must be renewed annually by the labor of the owner; and among *fructus naturales* all those which remained permanently fixed, for a greater or less period, in the ground, and so became part of the freehold. It was on this principle that roots, although an-

nual, were at first held to go to the heir instead of to the executor; and that turnips, in *Emerson v. Heelis, supra*, were held to be *fructus naturiales*; and it may well be assumed that the present doctrine that they are personal property is due not so much to the labor and cultivation required for raising them, as to their annual, perishable, transitory nature, which effectually precludes any thought of their ever becoming fixed and permanent in the soil. The true test, then, is the relation that the products of the land bear to it; whether they are so permanent as to become part and parcel of it, or are merely a temporary intrusion, so to speak; and the matter of labor is only a convenient, but now, owing to the change of conditions, a misleading arbitrary distinction, which has no controlling weight, and should be disregarded whenever it conflicts with the fundamental principle enunciated above.

IV.—The levy upon a growing crop may be made at any time after it has been planted; or if it be raised from seed, at any time after the seed has been sown, even before it is up; for the crop is growing in contemplation of law as soon as the seed has been sown: *Ayers v. Hawk* (N. J.), 11 Atl., 744; *Hare v. Pearson*, 4 Ired. (N. C. L.), 76; *Gillitt v. Truax*, 27 Minn., 528. It was held, however, in *Burleigh v. Piper*, 51 Iowa, 649, that a levy put into the sheriff's hands on May 2, with instructions not to sell until the grain had been harvested and stacked, was not valid against a chattel mortgage of the crop made subsequent to the levy, on the ground that the circumstances showed an intention on the part of

the judgment creditor to hold the levy as a security merely; and that, as the writ could not be fully executed during its lifetime, the debtor would be put to the expense of a new writ. But this argument is very feeble in view of the fact that it is unquestionably for the advantage of the debtor that the sale be delayed until the crop be ripe, when something near its value may be realized; and, as will be seen, not only is the weight of authority in favor of such a course, but several States have express statutory provisions that the sale of a growing crop under execution shall not take place until it is matured and fit to be gathered.

The levy upon a growing crop need not be made in the same manner as a levy upon other chattels. The rules of law governing such a levy are peculiar to the subject-matter, and do not require any act on the part of the officer, so far as the levy is concerned, which, if it were not for the protection of the writ, would make him a trespasser. Actual possession or custody on the part of the officer would be both unnecessary and impossible as long as the farm on which the crop is growing is in the actual possession of the defendant: *Johnson v. Walker*, 37 N. W. Rep., 639. It is sufficient for him to go upon the premises and announce that he seizes the crop to answer the exigencies of the writ, or call disinterested parties to witness his open assertion of the levy: *Bilby v. Hartman*, 29 Mo. App, 125, or go upon the premises and notify the persons interested that he has made the levy: *Barr v. Cannon*, 6 Iowa, 20. An attachment upon an unripe growing crop in possession of the de-

fendant is sufficiently levied by serving upon him copies of the writ and statutory notice: *Raventas v. Green*, 57 Cal., 254.

In States where growing crops are liable to seizure, the lien of the execution binds them from the date of its *teste*, or its delivery to the sheriff: *Edwards v. Thompson*, 85 Tenn., 720; *McKenzie v. Lamp-ley*, 31 Ala., 526; *Lindley v. Kelley*, 42 Ind., 294. But where the right of levying upon such crops is limited by statute, the lien of the execution does not attach until the time when the levy is allowable: *Edwards v. Thompson*, *supra*; *Adams v. Tanner*, 5 Ala., 740; *Evans v. Lamar*, 21 Ala., 333; *Scolley v. Pollock*, 65 Ga., 339. If other liens, as a chattel mortgage, for instance, are prior to the levy, its lien cannot prevail against them: *Houk v. Condon*, 40 Ohio St., 569, but after the levy has been made, the crop, while still remaining on the land, is not liable to a distress for rent, for during the time from the levy until the sale, it is considered as in *custodia legis*: *Smith v. Tritt*, 1 Dev. & Bat. (N. C. L.), 241. If the crop levied on be such as is classed among *fructus naturales*, the levy is absolutely void; and a parol permission from the defendant to the sheriff to seize such crops is an agreement relating to an interest in land, and consequently cannot validate the levy: *Bank v. Crary*, 1 Barb. (N. Y.), 543.

Where land is exempt under the homestead laws the crops growing thereon, being necessary to its beneficial enjoyment, are also exempt from levy and sale under execution. (*Cox v. Cook*, 46 Ga., 301; *Alexander v. Holt*, 59 Tex., 205).

V.—Although the levy be made while the crop is yet growing and

unripe, the execution creditor is not obliged to sell it at once; he may wait until it is ripe (*Whipple v. Foot*, 2 Johns. 418, S. C., 3 Am. Dec., 442), and the death of the defendant in execution before that time will not affect the validity of the levy and sale (*Eaton v. Southby*, Willes, 131). If, after the levy of an attachment upon a growing crop, the sheriff does nothing further until it is ripe, when he gathers it, there is no abandonment of the levy (*Raventas v. Green*, 57 Cal., 254). But, although the general and proper practice is to wait after the levy until the crop is ripe and fit to be gathered, on account of the injury that it would almost certainly occasion to the debtor to sell an unripe and growing crop; yet its personal character, and the right of levy on it, necessarily carry with them the right to sell it before it is ripe, if the execution plaintiff so elect (*Parham v. Tompson*, 2 J. J. Marsh, Ky., 159; *Stewart v. Doughty*, 9 Johns., 108). It has been held that the sale should be as soon as legally possible, because the duty of preservation and risk of keeping the crop safe do not devolve upon the officer (*Craddock v. Riddlesbarger*, 2 Dana, Ky., 205); but there is little force in this, for it is to the manifest advantage of the debtor that the crop shall bring as much as possible at the sale, whenever that takes place, and it is therefore his interest, and may be in so far considered *his* duty, to see to the preservation and safe-keeping of the crop. If it be sold while still unripe and growing, however, the title of the purchaser vests from that time against all others (*Coombs v. Jordan*, 3 Bland Ch., 284). He has a right to leave the crop upon the land until its

maturity, to enter and give it the necessary cultivation, and to gather and take it away when ripe (*Stewart v. Doughty*, *supra*; *Smith v. Tritt*, *supra*; *Thompson v. Craigmyle*, 4 B. Mon., Ky., 391, S. C. 41 Am. Dec., 240; *Bloom v. Welsh*, 3 Dutch., 177), and is to be allowed a reasonable time for that purpose (*Smith v. Tritt*, *supra*; *Shannon v. Jones*, 12 Ired., N. C. L., 206).

In order to make a valid sale of a standing crop, the officer need not go inside the field; it is sufficient if he be in view of it at such convenient distance that bidders can see what is offered and judge for themselves of the quantity, quality and value thereof (*Skinner v. Skinner*, 4 Ired., N. C. L., 175; *McNeely v. Hart*, 8 Id., 492). But a sale of a growing crop under execution, made at the distance of two miles from the place where the crop is standing, is void, and passes no title to the purchaser; for it is imperative that the crop be in the presence of the bidders (*Smith v. Tritt*, *supra*).

VI.—The interest of the judgment debtor in the crop is often an important consideration in determining its liability to execution. When the debtor is the sole owner of the crop, of course this question cannot arise; but when other persons have an interest therein it sometimes becomes a difficult matter to decide. The crops raised by the labor of a tenant by the curtesy initiate on land belonging to his wife are his, and are liable to execution for his debts (*Pourrier v. Raymond*, 1 Hannay, 520); but a crop raised on land held by husband and wife by entireties is held by them in the same manner as the land itself, and is not subject to levy and sale on execution against the husband

alone (*Patton v. Rankin*, 68 Ind., 245. S. C., 34 Am. Rep., 254). A lessee under an ordinary lease is the sole owner of the crops raised, as against the lessor, and they are liable to seizure on execution only as against him; but when land is let on shares, or to a so-called cropper, it then becomes a pure question of intention, to be gathered from the terms of the letting, whether the tenant or the landlord, or both jointly, is the owner of the crop, and for whose debts it is liable to be seized. As a general rule, the possession of the land is of controlling importance. If the lessor gives up the entire possession to the lessee, the latter is sole owner of the crop (*Gordon v. Armstrong*, 5 Ired., N. C. L., 409; *Waltson v. Bryan*, 64 N. C., 764; if he retain the entire possession in himself, the lessee is only a hired servant, and the title to the crop is in the lessor (*Porter v. Chandler*, 27 Minn. 301); while if the latter retain a partial possession or control only, he and the lessee are tenants in common of the crop, and it is liable to execution against either, the purchaser acquiring, of course, a title to the share of the debtor only. (*Hansen v. Dennison*, 7 Ill., App. 73; *Creel v. Kirkham*, 47 Ill., 344; *Johnson v. Hoffman*, 53 Mo., 504; *Lowe v. Miller*, 3 Gratt., Va., 205; *Stewart v. Doughty*, 9 Johns., 108; *Thompson v. Mawhinney*, 17 Ala., 367; *Pouder v. Rhea*, 32 Ark., 435; *Guest v. Opdyke*, 31 N. J. L., 552; *Moulton v. Robinson*, 27 N. H., 550). When each party is to take care of his own portion of the crop when ripe, the share of each is liable to execution against him (*Lindley v. Kelley*, 42 Ind., 294), and, as a general rule, where the facts are doubtful, the inclination

is to hold the parties tenants in common of the crop. (*Alwood v. Ruckman*, 21 Ill., 200).

When the agreement is that the cropper is to receive a portion of the crop in return for his labor, the title to the whole of the crop is in the lessor, and the cropper has no title to any part of the crop that can be taken in execution until he has been assigned his share by the lessor. *McNeely v. Hart*, 10 Ired. (N. C. L.), 63; *Rogers v. Colier*, 2 Bailey (S. C.), 58; *Porter v. Chandler*, *supra*. Where the lease contains a provision that the whole crop shall be at the control of the lessor until sold (*Esdon v. Colburn*, 28 Vt., 631), that the cropper's portion shall be assigned to him after he shall have paid his employer for the provisions furnished him while making the crop (*Hunter v. Edmundson*, Ga. Dec. Pt. 1, p. 74), or that the entire crop shall be the property of the lessor until all advances made by him to the tenant shall be repaid (*Howell v. Foster*, 65 Cal. 169), the lessee has no interest in the crop that can be attached or taken in execution, until he has complied with all the conditions of the lease. But when the share of the crops reserved to the lessor is in the nature of rent merely, the tenant has the exclusive possession of the soil, and consequently of the crop also; and the lessor, before his share is assigned to him, has no interest that can be levied upon. *Gordon v. Armstrong*, *supra*; *Williams v. Smith*, 7 Ind., 559; *Woodruff v. Adams*, 5 Blackf. (Ind.), 317; *Chissom v. Hawkins*, 11 Ind., 316; *Devore v. Kemp*, 3 Hill (S. C.), 259; *Harrison v. Ricks*, 71 N. C., 7; *Howard Co. v. Kyte*, 28 N. W. Rep., 609. In such a case, however, the crop may be

taken in execution against the lessee. *Sargent v. Courier*, 66 Ill., 245.

VII.—In some States, certain crops have been exempted from execution (*Carpenter v. Herrington*, 25 Wend., 370; *Horgan v. Amick*, 62 Cal. 401); and in others, the common law right of levy has been limited by statute. The Louisiana Code (Art. 465) does away with the distinction between *fructus industriales* and *fructus naturales*, providing that "standing crops and the fruit of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached." In Alabama, the Act of 1821 (Aik. Dig., sec. 41, p. 167), provided that "it shall not be lawful for any sheriff or other officer to levy a writ of *fieri facias* or other execution, on the planted crop of a debtor . . . until the crop is gathered." This, however, was repealed within a few years. In North Carolina, the Act of 1844, ch. 35, prohibited officers from levying executions upon "growing crops," which was held, in *Shannon v. Jones*, *supra*, to embrace only crops which were not matured. The Georgia Code, sec. 3642, enacts that "no sheriff or other officer shall levy upon any growing crop . . . usually raised or cultivated by the planters or farmers of this State, nor sell the same until such crop shall be matured and fit to be gathered." Under this Act it was held, in *Scolley v. Pollock*, 65 Ga., 339, that cotton in the field, not matured, was not liable to levy and sale, and the purchaser of the crop in its then condition from the defendant, obtained a good title against an execution taken out previously. The Tennessee Code (M.

& V., sec. 3749) exempts a growing corn crop from execution until the 15th of November; and the Civil Code of Kentucky forbids the levy and sale of a growing crop until October 1. In this latter State, however, there is a very wise and just provision (sec. 439 of the Code), which allows such a crop, after a return of "no property" upon an execution, to be subjected to the payment of a creditor's claim by a proceeding in equity.

There are some strong objections to be urged against the statutory provisions which absolutely forbid the levy upon a growing crop; for they in effect allow the debtor to wholly defeat the just claims of his creditors by aliening the land, with which the crop passes as an incident, before its maturity. "It is, in effect, a gift to the defendant in execution of the growing crop, provided he does not gather it himself, but disposes of it in its then condition." *ORMOND, J.*, diss. in *Adams v. Tanner*, 5 Ala., 740. It is true that the crop was liable to be sacrificed, under the common law rule, by a sale while it was unripe; but there was comparatively little danger of this, for it was equally to the disadvantage of the creditor, and, as has been seen, the usual practice was to delay the sale until the crop was ripe, the lien of the levy meanwhile making the creditor secure. In their anxiety to protect the debtor, the legislatures seem to have forgotten the creditor, who has equally strong claims to their protection. Such a course as that adopted in Kentucky, or that taken in Michigan (*Howell's Ann. Stat.*, sec. 7685) and Minnesota (*Gen. Stat.*, 1878, c. 66, sec. 315), which permits the levy of the execution, but forbids the sale of the crop until

it is ripe, pays sufficient regard to the rights and interest of *both* parties, and is far preferable to that which forbids the levy, and so pre-

vents the lien from attaching, and enables the debtor to defraud the creditor of his just claims.

PHILADELPHIA.

R. D. S.

“RES ADJUDICATA.”

There seems to be a tendency to substitute the above words in the place of the classic “Res Judicata” of the same language.

The latter words have been consecrated by a precise meaning given to them by the great jurists since the classic period of the civil law.

Modestinus defines the term thus : “Res judicata dicitur quæ finem controversiarum pronuntiatione judicis accepit. Quod vel condemnatione vel absolutione contingit.”¹ In French it is called *la chose jugée*, and in English we improperly anglicize the “ad-judicata” and call it the thing adjudged, with the meaning that it is a judgment in a judicial controversy rendered by a Court of last resort, or in a case from which an appeal has ceased to be available and the judgment has come to import absolute verity between the parties.

The term *res adjudicata* is also known to the Roman law, but is applied only to a particular class of cases or to public sales of property.

There are in the civil law the three actions called the *judicia divisoria*, named *familiæ erciscundæ* (the partition of estates among heirs), *de communi dividundo* (partition of property held in common) and *finium regundorum*, the suit to settle controversies respecting boundaries between contiguous lands. In these actions the respective portions of the property to be divided are *ad-judicated* to the parties and their rights under the decree may be called *res adjudicatæ*.²

¹ Pandects, Liber 42, Tit. 1, Lex. 3. See also the Code, Lib. 7, Tit. 45, Const. 3.

² See Institutes of Justinian, Liber 4, Tit. 17, Secs. 6 and 7.